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# SERIOUS BREACHES, THE DRAFT ARTICLES ON STATE RESPONSIBILITY AND UNIVERSAL JURISDICTION

Marjan Ajevski\*

## I. INTRODUCTION

On its fifty-first session, the International Law Commission (henceforth, “ILC”) adopted the Draft Articles on State Responsibility<sup>1</sup> (henceforth, “Draft Articles”) and submitted them to the General Assembly for approval in 2001. The work of the ILC on the Draft Articles took more than forty-four years before the Draft Articles reached their final shape. During the process of their drafting, several of its special rapporteurs came up with different solutions to the various problems at hand. One characteristic of the Draft Articles that is especially emblematic of these several (and sometimes turbulent) changes during their preparatory period was the issue of obligations and responsibilities arising out of a breach of a *ius cogens* norm or -as it was put in the earlier proposals of the Draft Articles- obligations arising out of crimes of states.<sup>2</sup>

The Draft Articles have been the focus of scholarly attention since their adoption by the ILC, as well as during the entire drafting period. Part of these scholarly contributions are used in this paper in order to explain some of the concepts discussed in the Draft Articles themselves; namely, those dealing with serious breaches of peremptory norms, the invocation of the responsibility of states and the duty to cooperate. But, there has been no discussion on the possible consequences that the Draft Articles may have, or have had, on other issues of international law dealing with similar concepts.

A similar phenomenon has happened with regard to the scholarly contributions on universal jurisdiction. There has been a wide discussion

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<sup>1</sup> UN General Assembly, *Resolution 56/82*, 18 Jan. 2002, *Responsibility of States for Internationally Wrongful Acts*, UN Doc., A/RES/56/82.

<sup>2</sup> International Law Commission, *Report of the International Law Commission on the Work of its 28th Session*, UN Doc., A/31/10.

of issues relevant to universal jurisdiction ranging from its legality, its limitations in terms of state and individual immunity, its pitfalls<sup>3</sup> and its futility. However, none have tackled the possibility of using concepts that are not closely related to individual criminal responsibility, but that can be used in an innovative way to further the reach of universal jurisdiction. It is within this gap in the discussion of both fields of international law that I want to position my research.

As this paper's title suggests, I will discuss the responsibilities and consequences arising from a serious breach of obligations emanating from a peremptory norm in the Draft Articles. I will also discuss the implications that this has to international legal issues other than state responsibility, more specifically with its implications to universal jurisdiction. I will investigate the possibility of whether and how one can use a codification that deals with the responsibility of states, to issues that regulate the criminal responsibility of individuals. My hypothesis is that certain obligations that have been codified in the Draft Articles (like the duty to cooperate) have permeated the narrow sphere of state responsibility in other fields of international law. These obligations can be combined with the peremptory status of the crimes falling under universal jurisdiction and can give an argument that states are obliged to: *one*, bring prosecutions against those individuals responsible for international crimes; and *two*, render assistance to each other in order to facilitate such prosecutions.

In section II, I will explain the notion of 'serious breach' as it is portrayed in the Draft Articles and the obligations and consequences that arise from it. In section III, I will briefly explain the notion of 'universal jurisdiction' and the crimes that are covered by it. I will also discuss their peremptory status, as well as the nature and consequences of peremptory norms. In section IV, I will combine the arguments of these separate spheres of international law and discuss its implications. I will forward the argument that the concept of communitarianism, specifically recognised in the Draft Articles and inherent to the concept of *ius cogens*, gives rise to, if not an obligation to prosecute, then at least a strong additional argument in the arsenal of the supporters of prosecutions under universal jurisdiction. I will also argue that the duty to cooperate in order to bring an end to a breach extends to requests of prosecuting states to other states for judicial assistance in criminal matters, regardless of bilateral arrangements among those states.

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<sup>3</sup> H.A. KISSINGER, "The Pitfalls of Universal Jurisdiction", *Foreign Affairs*, 2001, pp. 86-96.

## II. SERIOUS BREACHES OF A PEREMPTORY NORM IN THE DRAFT ARTICLES ON STATE RESPONSIBILITY: THE INCORPORATION OF THE COMMUNAL SPIRIT INTO THE ARTICLES

### I. *Overview of the development of the concept of 'serious breach' in the Draft Articles*

In 2001, the ILC submitted for approval its report on its fifty-first session and with it the final Draft Articles on the Responsibility of States for Internationally Wrongful Acts to the United Nations General Assembly (henceforth, "UNGA"). The Commission's work of four decades on the issue had finally come to an end. The Draft Articles themselves have undergone significant changes during the four decades of drafting. The whole concept of 'responsibility of states' dates back to before the creation of the UN and draws its roots from cases of diplomatic protection and the sending of diplomatic envoys.<sup>4</sup> This concept has emerged in an age of bilateralism and most of its rules deal with the invocation of state responsibility in situations arising out of bilateral relations; or multilateral relations where the consequences of the wrongful acts are limited to one or a small number of states. With the emergence of closer ties between states and the realisation that certain interests are common and vital to all states, the view on the norms governing the issue of state responsibility also started to change, reflecting this realisation.

One of the most notable changes in the whole concept of responsibility of states was the introduction of the distinction between the concept of international crimes of states and international *delicts* in 1976. This was accomplished through the provisional adoption of Article 19 that dealt with this issue.<sup>5</sup> Article 19 of the 1976 Draft<sup>6</sup> tried to incorporate the then

<sup>4</sup> D. BODANSKY and J. CROOK, "The ILC's State Responsibility Articles: Introduction and Overview", *American Journal of International Law*, 2002, pp. 773-791; G. NOLTE, "From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of Bilateral Conception of Inter-State Relations", *European Journal of International Law*, 2002, pp. 1083-1098.

<sup>5</sup> International Law Commission, *First report on State Responsibility by James Crawford Special Rapporteur on 1 May 1998*, UN Doc., A/CN.4/490/Add 1, § 43; for the general historical overview of the development of the Draft Articles, see also A. GATTINI, "A Return Ticket to 'Communitarisme' Please", *European Journal of International Law*, 2002, pp. 1181-1199; E. WYLER, "From 'State Crime' to Responsibility for 'Serious Breaches' of Obligations Under Peremptory Norms of General International Law", *European Journal of International Law*, 2002, pp. 1147-1160; G. NOLTE, "From Dionisio Anzilotti to Roberto Ago", *supra* note 4; J. CRAWFORD, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: a Retrospect", *American Journal of International Law*, 2002, pp. 874-890; R. ROSENSTOCK, "The ILC and State Responsibility", *American Journal of International Law*, 2002, pp. 792-797.

fresh development of the concept of *ius cogens* brought on by the adoption of the 1969 Vienna Convention on the Law of Treaties, and especially Article 53, where *ius cogens* is defined. Even as early as 1939, in his Hague Academy lectures, the Special Rapporteur Roberto Ago -under whom the provisional adoption of Article 19 occurred- had put forward the idea that a distinction could be made between state crimes and *delicts*.<sup>7</sup> The idea, for Ago, was not to put the focus on the infliction of punishment on the responsible state, but on the repressive character of the countermeasures that could be used in case of an international crime.<sup>8</sup>

This suggestion was not well accepted by some states and was opposed during the entire drafting history of the Draft Articles, as a concept that has no foundation in customary international law in relation to state responsibility.<sup>9</sup> Although some states<sup>10</sup> were strong supporters of the concept of international crimes of states, the concept was dropped by the time of the third and final reading of the Draft Articles. It was replaced by the notion of 'serious breach of a peremptory norm', which was introduced in Articles 40 and 41 of the final Draft Articles. An approach of a single type of responsibility of states for the commission of an internationally wrongful act was thus put into place and the distinction between crimes and *delicts* -at least when it came to states- became history. Crawford himself presented this shift of terminology in the Draft Articles as more than just a makeover of the concept of international crimes of states that could be used as a means of sneaking that same concept more easily under the radar of objector states. On the contrary, this shift was presented as a change of concepts that puts more focus on peremptory norms as a better established concept of international law than international crimes of states.

Regardless of the fact whether the change from international crimes of states to serious breaches of peremptory norms is a mere cosmetic change or has a wider conceptual meaning,<sup>11</sup> there are two important points that I want to highlight for our current discussion. The first point is the fact of the recognition of special communitarian interests of individual states as

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<sup>6</sup> International Law Commission, *Report on the Work of its 28th Session*, 1976 [reproduced in *ILC Yearbook*, 1976, Vol. II, Part I].

<sup>7</sup> G. NOLTE, "From Dionisio Anzilotti to Roberto Ago", *supra* note 4, p. 1093.

<sup>8</sup> *Ibid.*

<sup>9</sup> See International Law Commission, *First Report on State Responsibility*, *supra* note 5, § 52.

<sup>10</sup> Most notably the Nordic countries; see *ibid.*, § 53.

<sup>11</sup> See, for more details, E. WYLER, "From 'State Crime' to Responsibility for 'Serious Breaches' of Obligations Under Peremptory Norms of General International Law", *supra* note 5, pp. 1159-1160.

parts of a wider community of states; and second that this recognition has not been changed in any of the proposals put forward in the Draft Articles since the introduction of the divisions between crimes and *delicts* in 1976. The evolution of the notions of obligations *erga omnes* specifically recognised by the International Court of Justice (henceforth “ICJ”) in the *Barcelona Traction Case*<sup>12</sup> and later confirmed in the *East Timor Case*,<sup>13</sup> as well as the development of the concept of *ius cogens* in the 1969 Vienna Convention, led to the special recognition of these concepts in the Draft Articles.<sup>14</sup> This was originally carried out by the introduction of crimes of states in Article 19 and later changed to the concept of serious breach.<sup>15</sup> I will detail what an obligation of *erga omnes* character entails later in this section, while the consequences of *ius cogens* norms will be discussed more broadly in section III.

2. *Serious breaches of an obligation arising under a peremptory norm of general international law in the Draft Articles*

As noted previously, Articles 40 and 41 introduce the concept of ‘serious breach of a peremptory norm of general international law’ and they state:

“Article 40 - Application of this chapter:

- This chapter applies to the international responsibility which is entailed by a serious breach by a state of an obligation arising under a peremptory norm of general international law.
- A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible state to fulfil the obligation”.

“Article 41 - Particular consequences of a serious breach of an obligation under this chapter:

- States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.
- No state shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.
- This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international

<sup>12</sup> I.C.J., *Barcelona Traction, Light and Power Company, Limited [Belgium v. Spain; 2nd Phase]*, 5 Feb. 1970.

<sup>13</sup> I.C.J., *East Timor [Portugal v. Australia]*, 30 June 1995.

<sup>14</sup> International Law Commission, *Commentaries to the Draft Articles Submitted as Part of the Report of the International Law Commission on its Fifty First Session*, [reproduced in *ILC Yearbook*, 2001, Vol. II, Part II].

<sup>15</sup> *Ibid.*, Part II, Chapter III.

law”.<sup>16</sup>

As we can see from Articles 40 and 41, the Draft Articles deal only with serious breaches of obligations that arise under peremptory norms of international law. The Commentaries to the Draft Articles do not give a specific list or a set of criteria to define either what a peremptory norm is or what constitutes a serious breach. A peremptory norm is defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties as a “norm of general international law [...] accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.<sup>17</sup> The ICJ, for example, has found that the use of force contrary to the principles of the Charter is a peremptory norm in the *Nicaragua Case*,<sup>18</sup> as well as the prohibition of genocide and non-discrimination in the *Armed Activities on the Territory of the Congo Case*.<sup>19</sup> Unfortunately, the ICJ has not elaborated on a set of criteria for recognition of a norm as achieving the status of *ius cogens* in its case law. The Draft Articles elegantly avoid this issue by specifying that they do not deal with substantive rules, but with secondary rules of international law. The ILC, nevertheless, gives some examples that are already recognised as such, with the emphasis that the examples given by no means constitute an exhaustive list.<sup>20</sup>

Not every breach of an obligation arising under a peremptory norm gives rise to the provisions in Article 40 and 41, but only a serious one. In order for a breach to be deemed serious, it has to be considered a “gross or systematic failure by the responsible state to fulfil the obligation”.<sup>21</sup> The breach can either be gross or systematic; it does not require both elements to be present.<sup>22</sup> For a breach to be regarded as systematic, it has to be

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<sup>16</sup> *Ibid.*, Articles 40 and 41, p. 282.

<sup>17</sup> 1969 Vienna Convention on the Law of Treaties, Article 53.

<sup>18</sup> I.C.J., *Military and Paramilitary Activities in and around Nicaragua* [*Nicaragua v. US*], 27 June 1986.

<sup>19</sup> I.C.J., *Armed Activities on the Territory of the Congo* [*DRC v. Rwanda*], 3 Feb. 2006, §§ 64 and 78.

<sup>20</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 40, §§ 3-6; see also E. WYLER, From “State Crime” to Responsibility for “Serious Breaches” of Obligations Under Peremptory Norms of General International Law, *supra* note 5, pp. 1154-1157.

<sup>21</sup> International Law Commission, *2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, Article 40 § 2.

<sup>22</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 40, § 7.

carried out in an “organised and deliberate way”.<sup>23</sup> The term ‘gross’, on the other hand, refers to the intensity of the violation or of its effects.<sup>24</sup> Therefore, the term ‘serious’ denotes that a certain magnitude or scale of violations is necessary for it to be deemed a serious breach of an obligation arising under peremptory norms. For instance, in relation to the crime of torture, although it has attained the status of a peremptory norm, acts of torture need to be committed on a wider or systematic scale for them to achieve the status of a serious breach. Not every act of torture can bring about the type of responsibility envisaged in the Draft Articles. Nevertheless, the Commentaries do say that certain acts, by their very nature, can only be committed in a gross and systematic manner; aggression being the prime example given in the Commentaries.<sup>25</sup>

Article 41, on the other hand, deals with the specific obligations that other states have. By the term ‘other states’, the Draft Articles refer to the members of the international community that are neither an injured state, nor a responsible state. Article 41’s first obligation is for states to “cooperate to bring to an end through lawful means any serious breach”.<sup>26</sup> Article 41 § 1, therefore, creates a positive obligation on states to cooperate in order to facilitate the end of a breach. The Commentaries do not specify any special mechanism through which this cooperation should take place but they, however, note that this type of cooperation is best placed within the mechanisms of the United Nations.<sup>27</sup> The Commentaries also do not say what type of measures such cooperation should produce, since this will depend on the type of the peremptory norm and the type of breach in question.<sup>28</sup> What they say is that “it is, however, made clear that the obligation to cooperate applies to states whether or not they are individually affected by the serious breach; what is called for in the face of serious breaches is a joint and coordinated effort by all states to counteract the effects of these breaches”.<sup>29</sup>

The Commentaries do not specifically say that the duty to cooperate is

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<sup>23</sup> *Ibid*, § 8.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

<sup>26</sup> International Law Commission, 2001 *Draft Articles*, *supra* note 21, Article 41 § 1.

<sup>27</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 41, § 2.

<sup>28</sup> See, for more details on the duty to cooperate and Articles 40 and 41, A. GATTINI, “A Return Ticket to ‘Communitarisme’ Please”, *supra* note 5, pp. 1185–1188; E. WYLER, “From ‘State Crime’ to Responsibility for ‘Serious Breaches’ of Obligations Under Peremptory Norms of General International Law”, *supra* note 5.

<sup>29</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 41, § 3.



firmly established in international customary law and say that it may reflect a progressive development on the part of the Commission.<sup>30</sup> But, as Andrea Gattini has argued, the duty to cooperate has been stressed in several international documents, including Article 4 (a) of the Declaration of Principles on Friendly Relations and Cooperation of States adopted by the UNGA. According to the Declaration, states are required to cooperate in the maintenance of international peace and security and, in Article 4 (b) of the same declaration, for the promotion and respect of human rights and fundamental freedoms, as well as the elimination of every kind of racial discrimination and religious intolerance.<sup>31</sup> In his view, the high political connotation of the Declaration makes it “apparent that the ILC codified rather than developed the obligation to cooperate in bringing the violation to an end”.<sup>32</sup>

A second set of obligations arising from a serious breach is put down in Article 41 § 2 and these are: *first* the duty not to recognise as lawful the situation arising from the breach; and *second* not to render aid or assistance in maintaining that situation. The *first* of these two obligations requires that states, as members of the international community, do not recognise the situation that arises from the serious breach. A specific example of this obligation not to recognise is the non-recognition, neither through formal steps nor by specific actions, of the acquisition of a territory from another state by the use of force.<sup>33</sup> The obligation not to recognise the situation as legal also applies to the responsible state and even to the directly injured state. This is so because the injury is afflicted to the international community as a whole and, consequently, a waiver or recognition by the injured state would not preclude the responsibility of the state that is in breach.<sup>34</sup> The scope of the obligation not to recognise the situation is not unqualified and certain limits were put in the ICJ’s advisory opinion concerning *Namibia (South West Africa)*:

“The non-recognition of South Africa’s administration of the territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the government of South Africa on behalf of or concerning Namibia after the termination of the mandate are illegal and invalid, this invalidity cannot be extended to

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<sup>30</sup> *Ibid.*

<sup>31</sup> A. GATTINI, “A Return Ticket to ‘Communitarisme’ Please”, *supra* note 5, p. 1186.

<sup>32</sup> *Ibid.*

<sup>33</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 41, § 5.

<sup>34</sup> *Ibid.*, § 9.

those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the territory”.<sup>35</sup>

The obligation not to recognise and especially not to collectively recognise the consequences resulting from a serious breach is seen by the ILC as a prerequisite for any community response and a minimum necessary response by states to such a breach.<sup>36</sup> The *Namibia (South West Africa)* opinion and the ILC Commentaries to Article 41 are not very clear as to what other situation the obligation not to recognise and its exceptions apply. This is also true of its scope and, consequently, a wide margin is left to the discretion of the states and to the prevailing situation.<sup>37</sup>

The *second* obligation arising from Article 41 § 2 is the duty “not to render aid or assistance in maintaining that situation”.<sup>38</sup> This obligation deals with the question of the response of the other states after the fact of the occurrence of the serious breach. This obligation should be read in conjunction with Article 16 of the Draft Articles,<sup>39</sup> which deals with assistance by third states after the commission of an internationally wrongful act.<sup>40</sup>

The obligations not to recognise and not to render aid and assistance seem to be two sides of the same coin. The first is a negative obligation not to recognise a situation as legal; the second is a positive obligation, *i.e.*, an obligation not to take positive steps to maintain the consequences of that breach. Again it is important to point out that both the Commentaries and the ICJ’s *Namibia (South West Africa)* opinion do not give more precise guidelines on what constitutes aiding and assisting the maintenance of the consequences of the breach and leaves it to the specific situation at hand.<sup>41</sup>

Article 41 § 3 is what the ILC calls a ‘saving clause’, denoting two

<sup>35</sup> I.C.J., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [Namibia Advisory Opinion], Adv. Op., 21 June 1971, § 125.

<sup>36</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 41, § 8.

<sup>37</sup> See A. GATTINI, “A Return Ticket to ‘Communitarisme’ Please”, *supra* note 5, pp. 1188-1190.

<sup>38</sup> International Law Commission, *2001 Draft Articles*, *supra* note 21, Article 41 § 2.

<sup>39</sup> International Law Commission, *2001 Draft Articles*, *supra* note 21, Article 16, on “aid or assistance in the commission of an internationally wrongful act”.

<sup>40</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 41, § 11.

<sup>41</sup> See A. GATTINI, “A Return Ticket to ‘Communitarisme’ Please”, *supra* note 5, pp. 1189-1192.

consequences. First, that the obligations set forth in Article 41 §§ 1 and 2 do not prejudice the consequences for the responsible state prescribed in the other parts of the Draft Articles; namely, the cessation of the breach, the continuance of the performance of its obligations, the giving of guarantees of non-repetition and the making of reparations in conformity with the rules set out in the Draft Articles.<sup>42</sup> Second, that the consequences and obligations set out in Article 41 §§ 1 and 2 do not prejudice other consequences set out in other rules mainly of a primary nature of international law. One example given in the Commentaries is the collective response through the United Nations Security Council (henceforth, “UNSC”), including the use of force to counteract an act of aggression.<sup>43</sup>

3. *Who can invoke the responsibility of a state?*

Part III of the Draft Articles prescribes the implementation of state responsibility and it is covered in Articles 42-54. These articles deal with issues like: who can invoke state responsibility; what steps do they have to follow; how can a state lose its claim; whether countermeasures are allowed; who can use them and under what circumstances? One brief note before going more deeply into the issue of who can invoke the responsibility of a state: one cannot but notice the fact that the Draft Articles do not deal with an emerging and growing issue of invoking state responsibility by private; non-state actors.<sup>44</sup> This can be seen as a missed opportunity by the ILC to either codify or bring about a progressive development in the field. This is even more obvious when considering the fact that a wide number of international tribunals give standing to individuals or NGO's or other private parties and that there are international tribunals that also deal with the criminal responsibility of individuals.<sup>45</sup> In an age where an increasing number of institutions or international regimes are becoming or incorporating certain features of

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<sup>42</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 41, § 13.

<sup>43</sup> *Ibid*, § 14.

<sup>44</sup> See, for an overview of this gap in the Draft Articles, E. BROWN WEISS, “Invoking State Responsibility in the Twenty-First Century”, *American Journal of International Law*, 2002, pp. 798-816.

<sup>45</sup> See, on the proliferation and impact of international tribunals who give standing to private parties, L.R. HELFER and A.-M. SLAUGHTER, “Toward a Theory of Effective Supranational Adjudication”, *Yale Law Journal*, 1997, pp. 273-328; L.R. HELFER and A.-M. SLAUGHTER, “Why States Create International Tribunals: A Response to Professors Posner and Yoo”, *California Law Review*, 2005, pp. 899-956; E.A. POSNER and J.C. YOO, “Judicial Independence in International Tribunals”, *California Law Review*, 2005, pp. 1-74; E.A. POSNER and J. C. YOO, “Reply to Helfer and Slaughter”, *California Law Review*, 2005, pp. 957-973.

supranational arrangements,<sup>46</sup> it is hardly justifiable not to discuss the invoking of state responsibility by private parties.

Regardless of this gap, there is a certain characteristic of Part III of the Draft Articles that is of significant importance for this topic; namely, the invocation of state responsibility by a state other than the injured state in cases of a breach of an obligation *erga omnes*, set down in Article 48. The notion of *erga omnes* obligations has been established by the ICJ in the *Barcelona Traction Case* where it said:

“In particular, an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*”.<sup>47</sup>

The ICJ gave some tentative clues as to where those obligations arise from; namely, from the outlawing of aggression and genocide, the principles and rules concerning the basic rights and freedoms of the human person, the protection against slavery and racial discrimination,<sup>48</sup> as well as interference with the right of self-determination of peoples.<sup>49</sup>

I would now like to shortly comment on the links between obligations *erga omnes* and norms of *ius cogens*. Obligations *erga omnes* are obligations that are owed to every state because every state has an interest in securing that obligation. The term ‘*erga omnes*’ only deals with the issue of obligations that one state has towards every other state in the international community of states. On the other hand, the term ‘*ius cogens*’ depicts the status that norms have, relative to all other types of norms of international law. It can be said that these are similar concepts but looked at from different vantage points, one from the point of obligations, the other from

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<sup>46</sup> There are differing interpretations on what a supranational body or system is but one of their main traits is the ability to penetrate the surface of the state and be able to interact with the different players of the internal legal system of the state; see, for more details, L.R. HELFER and A.-M. SLAUGHTER, “Toward a Theory of Effective Supranational Adjudication”, *supra* note 45.

<sup>47</sup> I.C.J., *Barcelona Traction, Light and Power Co., Ltd*, 5 Feb. 1970, § 33.

<sup>48</sup> *Ibid*, § 34.

<sup>49</sup> I.C.J., *East Timor*, § 29.

the point of hierarchy of norms.<sup>50</sup> It is not always clear whether an obligation that has an *erga omnes* character is always a *ius cogens* norm, but it seems that the reverse is almost certainly true; a *ius cogens* norm will always produce obligations *erga omnes*, due to the underlying values that it enshrines.<sup>51</sup>

The ILC itself had to consider this issue of the interplay between obligations *erga omnes* and norms of *ius cogens* when deciding on what to focus -peremptory norms or obligations *erga omnes*- when talking about the consequences of a breach of a peremptory norm and the issue of who has the right to invoke the international responsibility of a state. It came to the conclusion that there is no settled answer to whether, when one speaks about *erga omnes* and *ius cogens*, one is using interchangeable or separate and distinct concepts. The ILC put it best when talking about the relation between *ius cogens* and *erga omnes* by saying:

“Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became Article 53 of the Vienna Convention involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all states in compliance - *i.e.*, in terms of the present Articles, in being entitled to invoke the responsibility of any state in breach”.<sup>52</sup>

I would like to stress that for this paper the issues seems to be moot considering the fact that the crimes discussed below are universally accepted as producing *erga omnes* obligations, due to the values that

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<sup>50</sup> M.C. BASSIOUNI, “Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes, Ius Cogens and Obligations Erga Omnes”, *Law and Contemporary Problems*, 1996, pp. 63-74.

<sup>51</sup> M. RAGAZZI, *The Concept of International Obligations Erga Omnes*, Oxford, Oxford University Press, 2000, pp. 190-210.

<sup>52</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Part II, Chapter III, § 7.

international crimes protect.

Article 48<sup>53</sup> answers the question of who can invoke the responsibility of a state other than the injured state. There are two types of states that fall under this category: the first being a group of states to which the responsible states owe certain obligations; *e.g.*, a group created by a multilateral treaty that is established to protect a particular interest of that group of states.<sup>54</sup> I will not deal with these types of obligations in this paper because they are not a reflection of communitarianism in international law, but of a mechanism of protection of interests that are particular to a specific group of states that may not be shared by the community of states as a whole. The second group of states is comprised of all states in the international community because the obligations in question are of an *erga omnes* character; *i.e.*, they are owed to the international community as a whole.

The ILC included the provisions of Article 48 § 1 (b) in order to give effect to the ICJ's statement on *erga omnes* obligations in the *Barcelona Traction Case*. Specifically, it understood that, in obligations that are deemed to be of such importance as to be qualified as *erga omnes*, every state has a legal interest in their protection.<sup>55</sup> There are no special criteria that a state has to meet in order to be able to invoke the responsibility of the state in breach, since obligations *erga omnes* are owed to the international community as a whole and every state is a part of that same community.<sup>56</sup> Under the provisions of Article 48 § 2, a state other than the injured state has certain prerogatives. Namely, it can call for a cessation of the breach; a return to normal behaviour of the responsible state; to request guarantees of non-repetition of the act; and, according to subparagraph (b), claim reparations. The list given in Article 48 § 2 is exhaustive,<sup>57</sup> which means that other states do not have the full range of options that injured states have when responding to a breach of an obligation.

One important distinction between the options that an injured state has, contrary to all other states in terms of responses to an internationally wrongful act, is the recourse to countermeasures. Countermeasures are acts that would normally be considered as internationally wrongful acts if they were not undertaken for the purpose of forcing the responsible state

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<sup>53</sup> International Law Commission, 2001 *Draft Articles*, *supra* note 21, Article 48, on "invocation of responsibility by a state other than an injured state".

<sup>54</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 48, §§ 4-5.

<sup>55</sup> *Ibid.*, § 8.

<sup>56</sup> *Ibid.*, § 10.

<sup>57</sup> *Ibid.*, § 12.

to cease its wrongful act, to start the procedure of compliance with its obligations and to start making the appropriate reparations.<sup>58</sup> Countermeasures that are taken by other states on behalf of the injured state in relation to breaches of obligations *erga omnes* are called countermeasures of general interest or collective countermeasures. The reason why countermeasures of general interests are not specifically authorised in the Draft Articles is because countermeasures are a legal notion commonly associated with self-help and more in private rather than public law. They are available to injured states because the institutions of the international system have failed and, therefore, it is up to the individual state to correct the wrong that has been inflicted upon it. Because it is a mechanism of self-help, the concept of collective countermeasures inherently relies on the self-assessment of the injured party to decide whether an internationally wrongful act has been performed. A further reason why the ILC did not want to specifically put countermeasures of general interest in the Draft Articles is the fact that the ILC itself was afraid that countermeasures of general interest would open the door to international vigilantism.<sup>59</sup>

But this is not the whole story. Staying in the field of countermeasures, the ILC, in Article 54, decided to put another savings clause by saying that the chapter dealing with countermeasures and the lack of inclusion of countermeasures of general interests does not prejudice the taking of other lawful means to bring about the invocation of responsibility by states other than the injured state as in case of Article 48. This means that states are free to take any lawful actions, individually or collectively, either through an international organisation or as a coalition, to put pressure on the responsible state for a cessation of the wrongful act and for reparations to the injured state.<sup>60</sup>

The Commentaries argue that the actions envisaged in Article 48 § 2 can only be taken on behalf of the injured state, especially with regard to the

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<sup>58</sup> See, for a more detailed discussion on countermeasures and reparations in the Draft Articles, D. ALLAND, "Countermeasures of General Interest", *European Journal of International Law*, 2002, pp. 1221-1239; D.J. BEDERMAN, "Counterintuiting Countermeasures", *American Journal of International Law*, 2002, pp. 817-832; D. SHELTON, "Righting Wrongs: Reparations in the Articles on State Responsibility", *American Journal of International Law*, 2002, pp. 833-855.

<sup>59</sup> See D. ALLAND, "Countermeasures of General Interest", *supra* note 58, pp. 1126-1233.

<sup>60</sup> The Commentaries give a number of examples where states have acted collectively in this manner but still concludes that the practices is embryonic to be deemed as reaching the status of customary law; see International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 54, §§ 2-4.

request for reparations, and in certain instances the state making such a claim might be requested to show that it is acting in the interest of the injured party.<sup>61</sup> It is important that states are authorised to invoke the responsibility of a state when there is no directly injured state, especially when a norm requiring an *erga omnes* obligation is breached. This is because of the fact that in such instances, it is theoretically possible that there will be no single state authorised to call for the cessation of the wrongful act by the responsible state and the act would continue. This is particularly true for obligations that are of such importance that they are owed to the international community as a whole. It has been noted,<sup>62</sup> though, that because other measures under Article 54 have been limited to only lawful means countermeasures are precluded under the Draft Articles. This is because countermeasures are by definition unlawful acts if adopted without prior commitment of a wrongful act of the state against which the countermeasures are taken. At this point, I would like to summarise the argument by quoting the Commentaries to the Draft Articles:

“The current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of states. At present there appears to be no clearly recognised entitlement of states referred to in Article 48 to take countermeasures in the collective interest. Consequently it is not appropriate to include in the present Articles a provision concerning the question whether other states, identified in Article 48, are permitted to take countermeasures in order to induce a responsible state to comply with its obligations. Instead Chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law”.<sup>63</sup>

#### 4. *The idea of communitarianism in the Draft Articles*

The concept of responsibility of states for internationally wrongful acts in its initial historical conception it was inherently bilateral as were most relations among states. Even though multilateral agreements did exist they were seen as nothing more than a bundle of bilateral agreements.<sup>64</sup> On the

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<sup>61</sup> *Ibid.*, Article 48, § 12.

<sup>62</sup> See D. ALLAND, “Countermeasures of General Interest”, *supra* note 58.

<sup>63</sup> It is worth noting that the Commentaries do mention a significant number of instances where states have acted collectively in response to breaches of *ius cogens*; see International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 54, § 6.

<sup>64</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 42, § 8; which state that, “although a multilateral treaty will characteristically establish a framework of rules applicable to all the states parties, in certain cases its



other hand, after World War II, the setting of international law - and the international system as a whole - began to change; we can no longer talk about international relations in the typical sense, but rather of trans-national relations.<sup>65</sup> In this trans-national world, the interactions in the international arena are no longer carried out by governments alone, through their organs for foreign affairs or by international organisations, but more and more between groups of individuals, NGOs, multinational companies, unions, guilds and professional societies, independent agencies and individuals themselves. The international system has moved from the concept of billiard balls to the concept of the spider's web, where the interactions between individuals grow at an impressive rate. The world has become more globalised, as well as more fragmented, and a sense of a world community is more and more evident.

These changes have found their way into the Draft Articles on State Responsibility. Articles 40, 41, 48 and 54, recognise the importance of the values that *ius cogens* norms protect and, consequently, create the obligation for states, even those who are not directly affected by the breach, to cooperate in order to bring about its end and to counter its effects.<sup>66</sup> Furthermore, the Draft Articles prescribe the negative obligation of not recognising the situation arising from the breach of a *ius cogens* norm and the obligation not to take positive steps like aiding and assisting in perpetuating the situation created by the breach.

The Draft Articles also give effect to the notion of obligations *erga omnes*, obligations that are owed to the international community of states as a whole, because it is recognised that every member of that community has a legal interest in the performance of these types of obligations. It does so by allowing for every member of that community to call on the responsible state to be accountable. Every state can call on the responsible state to cease the wrongful act, to continue its normal and lawful conduct and to give appropriate reparations for the damages caused. Although the Draft Articles do not speak of countermeasures of general interest, whether taken collectively or by individually concerned states, they do not exclude them either. This is because their practice is still not sufficient for it to

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performance in a given situation involves a relationship of a bilateral character between two parties" and that "multilateral treaties of this kind have often been referred to as giving rise to bundles of bilateral relations".

<sup>65</sup> See, about the concept of trans-national relations, H.H. KOH, "Why Do Nations Obey International Law", *Yale Law Journal*, 1997, pp. 2599-2659; L.R. HELFER and A.-M. SLAUGHTER, "Toward a Theory of Effective Supranational Adjudication", *supra* note 45.

<sup>66</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 41, § 3.

have crystallised into customary international law, and thus allowing in the future for individual states to take the cause of the international community when a breach of a *ius cogens* or *erga omnes* norm would occur.

### III. A SHORT DISCUSSION OF UNIVERSAL JURISDICTION

#### 1. Overview of the concept

One of the first difficulties presented when discussing universal jurisdiction is the problem of its definition. When discussing universal jurisdiction judges and scholars have referred to it as a “true”, “classical”, “pure”, universal jurisdiction “properly so called” and so on. The *ad hoc* judge, Van den Wyngaert, in the *Arrest Warrant Case* concluded that “there is no generally accepted definition of universal jurisdiction in conventional or customary law; states that have incorporated that principle in their domestic legislation have done so in a very different way”.<sup>67</sup> Both scholars and judges have used different terms from ‘true’, ‘proper’ and ‘pure’ universal jurisdiction, to using a narrower term like universal jurisdiction *in absentia*<sup>68</sup> as a separate concept. The term ‘universal jurisdiction’ itself implies that what is understood to be the subject of its discussion is the jurisdiction of states. Under public international law, there are two types of jurisdiction that a state may have; one is the jurisdiction to prescribe and the other is the jurisdiction to enforce.<sup>69</sup> Since this discussion is about criminal law the discussion below is limited to criminal jurisdiction exercised by states.

Jurisdiction to prescribe means that a state can prescribe a certain conduct by groups or individuals as criminal, either by statutory acts, executive orders or judicial decisions; to state what the *mens rea* and the *actus reus* of the crime is and prescribe penalties for it. What conduct is deemed criminal is generally left to the discretion of the states themselves.<sup>70</sup> On the other hand, a jurisdiction to enforce means that a state can take actions directed to enforcing the laws it has enacted. This can be executed through various different kinds of organs, most notably through its police forces and judicial bodies.<sup>71</sup> These are separate kinds of jurisdictions and, although they are intertwined -that is to say, a state cannot have a jurisdiction to enforce if it first did not prescribe that conduct as criminal-

<sup>67</sup> I.C.J., *Arrest Warrant of 11 April 2000 [DRC v. Belgium]*, 14 Feb. 2002, VAN DEN WYNGAERT, Dissenting Opinion, § 44.

<sup>68</sup> See *ibid.*, GUILLAUME, Separate Opinion; HIGGINS, KOOIJMANS and BUERGENTHAL, Joint Separate Opinion.

<sup>69</sup> See R. O’KEEFE, “Universal Jurisdiction; Clarifying the Basic Concept”, *Journal of International Criminal Justice*, 2004, pp. 735-760, at p. 736.

<sup>70</sup> *Ibid.*, p. 737.

<sup>71</sup> *Ibid.*

they have to be kept apart when discussing them, since their use in similar situations can have different consequences under international law. Namely, the exercise of the jurisdiction to enforce on the territory of another state, without that state's express permission, is contrary to international law. This is best summarised in the *dictum* of the Permanent Court International Justice (henceforth, "PCIJ") in the *Lotus Case*. The *Lotus* standard is given by the majority decision, which reads that:

"[International law] far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards to other cases, every state remains free to adopt the principles which it regards as best and most suitable".<sup>72</sup>

But, in order for a state to have wrongfully conferred upon itself extraterritorial jurisdiction, a rule of public international law must be shown to exist barring that specific kind of jurisdiction. And the court in the preceding paragraphs found one such prohibition, namely:

"The first and foremost restriction imposed by international law upon a state is that -failing the existence of a permissive rule to the contrary- it may not exercise its power in any form in the territory of another state. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention".<sup>73</sup>

States can prescribe their jurisdiction under several 'heads' or 'titles' which give the specific conduct in question a link to the state itself and therefore generally shows the underlying interest of that state to prosecute that conduct. These titles are: the territoriality principle, the nationality principle, the passive personality principle, the protective principle and the universality principle.<sup>74</sup> The doctrine of effect has also been used by several states to define their jurisdiction. The latter five principles are also known as extraterritoriality principles.

The most widely-used kind of jurisdiction is the territorial jurisdiction.

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<sup>72</sup> P.C.I.J., S.S. *Lotus* [France v Turkey], 7 Sept. 1927, *Series A*, Vol. 10, p. 19.

<sup>73</sup> *Ibid.*

<sup>74</sup> See M.N. SHAW, *International Law*, 5th ed., Cambridge, Cambridge University Press, 2003, p. 579; R. O'KEEFE, "Universal Jurisdiction", *supra* note 69, p. 736.

This jurisdiction means that a state can prescribe and prosecute a crime that has been committed on the territory of that state. In the term 'territory of a state', aircraft and sea vessels that use that state's flag are included. A crime does not have to be completely perpetrated on the territory of the state for it to have jurisdiction. A crime can be started in the territory of one state and be finished in another, the most typical example being when a person fires a gun across the border from one state into another and kills a person on the other side. The act was started on the territory of one state but was finished on the territory of another. In this case, under the territoriality principle, both states have the jurisdiction over that crime. The territoriality principle is the most widely used because the state has the most clear link with the crime; it has the general responsibility over the conduct of law on its soil, the evidence and witnesses are on its territory as well as the victims of the crime. The vindication of the victimised individual or group is also best accomplished by territorial jurisdiction.<sup>75</sup>

The nationality principle is an extraterritorial one, meaning that it is mostly used when a national of that state commits a crime outside the territory of the individual's state. In this case the state of which the individual is a national can prosecute her. This principle has been largely part of the continental law systems, but it is not unknown in Common Law systems for the most serious crimes, such as murder or treason. This principle is used because of the special link that an individual has with her state through her nationality. A further argument is that, in some instances, states have clauses for non-extradition of nationals to other states in their constitutions and when an individual tries to escape justice by seeking refuge in her own state, the state of nationality can prosecute her in the interest of justice.<sup>76</sup>

The passive personality principle means that a state can have jurisdiction over a crime that has been committed abroad against one of its nationals. This is a rarely used concept and has been controversial in the past.<sup>77</sup> Today, as it has been said by judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant Case*, this principle "meets with relatively little opposition, at least so far as a particular category of offences is

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<sup>75</sup> See M.N. SHAW, *International Law*, *supra* note 74, pp. 579-584; R. O'KEEFE, "Universal Jurisdiction", *supra* note 69, p. 737.

<sup>76</sup> See M.N. SHAW, *International Law*, *supra* note 74, pp. 584-591; R. O'KEEFE, "Universal Jurisdiction", *supra* note 69, p. 738.

<sup>77</sup> See P.C.I.J., S.S. *Lotus* [*France v Turkey*], 7 Sept. 1927, LODER, Dissenting Opinion, p. 36.

concerned”.<sup>78</sup>

The protective principle allows for a state to prescribe and prosecute a crime that has been committed abroad by an individual who is not a national. The rationale behind this is that because the crime in question affects the vital national interests of the state, it can prosecute it. A prime example for this is counterfeiting the currency of a state, which is widely considered as a crime that falls under the protective principle because counterfeiting of the national currency, cumulatively taken, can subvert the national economy. The crime of treason is also another good example of this principle since the act is done against the national security interests of the state. The protective principle is combined with the effects doctrine which means that if a conduct can have an adverse effect in the territory of a state, the state can criminalise that conduct, like attempted smuggling of narcotics into the territory of a state. In this example, even though the crime was not committed on the territory of the prosecuting state or by its nationals and its nationals are not yet victims, the negative effect that narcotics can have motivates the state to protect itself. The effects doctrine is mostly used in matters when prescribing immigration laws and economic offences and has most recently been used by the United States and the European Union in their antitrust legislations.<sup>79</sup>

The final principle which has been used by states to prescribe a conduct as criminal is the universality principle, which is the partial topic of this paper. This principle means that a state can assert jurisdiction over a crime that does not have any of the above-mentioned links to it. The crime could have been committed on the territory of another state by an individual that is not a national of that state, against an individual that is also not its national and that does not have a dilatory effect on its territory, but under the doctrine of universal jurisdiction, the state can still exercise jurisdiction over that crime.<sup>80</sup>

In order to further clarify my point, since, as we have seen, different terms are used for the concept of universal jurisdiction, I will define ‘universal jurisdiction’ -for the purposes of this paper- as the jurisdiction of states to prescribe and prosecute a certain conduct that is directed against

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<sup>78</sup> I.C.J., *Arrest Warrant of 11 April 2000*, 14 Feb. 2002, HIGGINS, KOOIJMANS and BUERGENTHAL, Joint Separate Opinion § 47; see also M.N. SHAW, *International Law*, *supra* note 74, pp. 589-591; R. O’KEEFE, “Universal Jurisdiction”, *supra* note 69, p. 739.

<sup>79</sup> See M.N. SHAW, *International Law*, *supra* note 74, pp. 591-592; R. O’KEEFE, “Universal Jurisdiction”, *supra* note 69, p. 739.

<sup>80</sup> M.N. SHAW, *International Law*, *supra* note 74, pp. 592-593; R. O’KEEFE, “Universal Jurisdiction”, *supra* note 69, p. 739.

international norms, values and interests that are deemed to be vital to the community of nations so as to entail universal condemnation as a criminal conduct without any other links to the state prescribing it. This definition offers a combination of two different elements, one that has been put forward by the 2001 Princeton Principles on Universal Jurisdiction, which define universal jurisdiction as criminal jurisdiction based solely on the nature of the crime.<sup>81</sup> According to the Princeton Principles, the specific heinousness of the crime is what warrants universal jurisdiction over that crime.<sup>82</sup> I argue that the heinousness of a crime is not a specific enough term for a definition since a murder in most cases is heinous, but it is not something that we associate with universal jurisdiction.<sup>83</sup> Therefore, I would introduce a second element, brought forward by Theodor Meron; namely, that “these are [...] offences that are recognised by the community of nations as of universal concern, and as subject to universal condemnation”.<sup>84</sup> The fact that the crime that is committed is directed at the values and interests that are vital to the community of nations as a whole is the element that should define these crimes as falling under universal jurisdiction.

## 2. *Universal jurisdiction but for what crimes?*

As the *Lotus Case* shows, unless a prohibitive rule of international law exists, states are generally free to prescribe their jurisdiction in a manner that they see fit and for crimes which they deem fit. After saying this, it seems unnecessary to go into any great length as to why states should stop only for a certain number of crimes; and if they should then why only for those and not others. This is not the specific topic of this paper, but suffice it to say that one good reason why states stop at a small number of crimes is strictly prudential: if states prescribe universal jurisdiction for every crime in their criminal codes they would never be able to handle all the cases that come up in the world. A second reason is the fact that not

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<sup>81</sup> 2001 *Princeton Principles on Universal Jurisdiction*, Principle 1 § 1, p. 28; which states that, “for the purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction”.

<sup>82</sup> 2001 *Princeton Principles on Universal Jurisdiction*, p. 48; which states that “it should be carefully noted that the list of serious crimes is explicitly illustrative, not exhaustive; Principle 2 § 1 leaves open the possibility that, in the future, other crimes may be deemed of such a heinous nature as to warrant the application of universal jurisdiction”.

<sup>83</sup> See E. KONTOROVICH, “The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundations”, *Harvard International Law Journal*, 2004, pp. 183-237.

<sup>84</sup> T. MERON, “International Criminalisation of Internal Atrocities”, *American Journal of International Law*, 1995, pp. 554-577, at p. 570.

all crimes are recognised as international crimes. Because of the limits of this paper, I will use the list of crimes that has been put forward by the Princeton Principles on Universal Jurisdiction as an authoritative one and point the reader in that direction for a good discussion on the issue. In this part of the paper, I will deal with the nature of the crimes and their peremptory status in international law.

The *Princeton Principles* list the following crimes: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.<sup>85</sup> This list is ordered according to historical progression and in no way should it be construed as indicating any preference of one crime over another in terms of their gravity.<sup>86</sup> One can deduct several commonalities that have been discussed in the literature in connection with these crimes.<sup>87</sup> The *first* common characteristic is that they are all general rules of international law of a customary nature and, therefore, obligatory to all states. Except for crimes against humanity all of the crimes are set down in international treaties which have crystallised into custom or have been codified from custom to treaty.<sup>88</sup> But, this only means that states are obligated to prevent or prosecute the commission of these acts and does not say what jurisdiction should be awarded for them. These rules are of a substantive law nature; they define the conduct that is criminalised and prescribe the criminal responsibility of the individual that commits them. What these rules do not do is settle the issue of jurisdiction of states when it comes to the obligation to prosecute. The narrowest obligation that arises for states from this is to prescribe the conduct as criminal in their domestic laws and prosecute these crimes if they are committed on their territory. Furthermore, these norms deal with the responsibility of individuals and not of states, although they do prescribe certain obligation on states like the obligation to prosecute if they are committed on their territory.

The *second* common characteristic of these crimes is the fact that they have been recognised by courts or scholars as being peremptory norms of international law or *ius cogens*. The concept of '*ius cogens*' saw its first codification in Article 53 of the 1969 Vienna Convention on the Law of Treaties, which stipulates that:

*"Article 53 - Treaties conflicting with a peremptory norm of general*

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<sup>85</sup> 2001 *Princeton Principles on Universal Jurisdiction*, Principle 2 § 1.

<sup>86</sup> *Ibid.*, p. 45.

<sup>87</sup> See E. KONTOROVICH, "The Piracy Analogy", *supra* note 83.

<sup>88</sup> See M.C. BASSIOUNI, "The History of Universal Jurisdiction and Its Place in International Law", in S. MACEDO, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, Philadelphia, University of Pennsylvania Press, 2004, Chapter I, pp. 39-63.

*international law:*

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

But the idea of *ius cogens* itself goes back longer than the drafting history of the Vienna Convention. The idea came to be discussed in the late 1930s, as Verdross wrote his article on *Forbidden Treaties in International Law*,<sup>89</sup> forwarding the notion that there are certain treaties that should not be recognised or enforced by international tribunals because they are *contra bonos mores* or against good morals.<sup>90</sup> He found the source of *ius cogens* in the general principles of law that are common to all nations. He argued that all nations, democratic or totalitarian, restrict the freedom of contract in domestic law by declaring all contracts or agreements that are against the good morals of the given society null and void. He also gives examples of nations and provisions.<sup>91</sup> He later goes on to give four examples of treaties that would be against the good morals of international society.<sup>92</sup>

The outbreak of WW II tabled the discussion for some better time in the future, but this was not for long. The concept was briefly re-visited by Humphrey in 1945, arguing that the development of international relations has produced an international society; and where there is a society there is law -*ubi societas ibi ius*- and some of that law protects the core values of that society and therefore has priority.<sup>93</sup> The notion that international agreements can be found as producing no legal effect because they are against the good morals of a society, was recognised in a brief reference in a decision of the Military Tribunal in Nuremberg under Control Council Law No 10 in the case of *United States v. Krupp*. The Tribunal said that even if there were a treaty that authorised French prisoners of war to be used in the German armaments industry, those treaties would be void

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<sup>89</sup> A. VERDROSS, “Forbidden Treaties in International Law: Comments on Professor Garner’s Report on ‘The Law of Treaties’”, *American Journal of International Law*, 1937, pp. 571-577.

<sup>90</sup> *Ibid.*, p. 572.

<sup>91</sup> *Ibid.*, pp. 573-574.

<sup>92</sup> *Ibid.*, pp. 574-576.

<sup>93</sup> See J.P. HUMPHREY, “On the Foundations of International Law”, *American Journal of International Law*, 1945, pp. 231-243.



under international law as *contraire aux bonnes moeurs*.<sup>94</sup>

The debate about the concept of '*ius cogens*' has been continuing in various different forums with certain authors giving reasons for,<sup>95</sup> and others giving reasons against the concept or its dangers and its futility.<sup>96</sup> One of the points of contention about *ius cogens* norms is their source. Article 53 of the Vienna Convention states that peremptory norms are norms "accepted and recognised by the international community of states as a whole" and therefore puts the source of peremptory norms in the consent of states. Others put the source of *ius cogens* norms in natural law, international public order, or general principles of international law.<sup>97</sup> If the source of *ius cogens* is derived from consent of states, then their applicability is limited only to the law on treaties with regard to the validity and applicability of treaties. For those who see the sources of *ius cogens* norms in public order, peremptory norms are there to protect the highest values of the community of states and, therefore, are of a higher level in the hierarchy of norms. They also radiate their effect beyond treaty law and can be used in the sphere of the other two sources of international law, which are customs and general principles of international law. As the *ad hoc* judge Dugard puts it in his separate opinion in the *Armed Activities on the*

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<sup>94</sup> See D. SHELTON, "Normative Hierarchy in International Law", *American Journal of International Law*, 2006, pp. 291-323.

<sup>95</sup> See A. VERDROSS, "Ius Dispositivum and Ius Cogens in International Law", *American Journal of International Law*, 1966, pp. 55-63; C.A. FORD, "Adjudicating Ius Cogens", *Wisconsin International Law Journal*, 1994, pp. 145-181; D.S. MITCHELL, "The Prohibition of Rape in International Humanitarian Law as a Norm of Ius Cogens: Clarifying the Doctrine", *Duke Journal of Comparative and International Law*, 2005, pp. 219-257; D. SHELTON, "Normative Hierarchy in International Law", *supra* note 94; E.M. KORNICKER UHLMANN, "State Community Interests, Ius Cogens and Protection of the Global Environment: Developing Criteria For Peremptory Norms", *Georgetown International Environmental Law Review*, 1998, pp. 101-135; J.I. CHARNEY, "Universal International Law", *American Journal of International Law*, 1993, pp. 529-551.

<sup>96</sup> See A.M. WEISBURD, "The Emptiness of the Concept of Ius Cogens, as Illustrated by the War in Bosnia-Herzegovina", *Michigan Journal of International Law*, 1995, pp. 1-51; C. KAHGAN, "Ius Cogens and the Inherent Right to Self-Defence", *ILSA Journal of International & Comparative Law*, 1997, pp. 767-827; G. SCHWARZENBERGER, "International Ius Cogens?", *Texas Law Review*, 1964-1965, pp. 455-478; P. WEIL, "Towards Relative Normativity in International Law", *American Journal of International Law*, 1983, pp. 413-442; see also, for a more detailed discussion, D. SHELTON, "Normative Hierarchy in International Law", *supra* note 94.

<sup>97</sup> See D. SHELTON, "Normative Hierarchy in International Law", *supra* note 94, pp. 300-302.

*Territory of the Congo Case*,<sup>98</sup>

“Norms of *ius cogens* are a blend of principle and policy. On the one hand, they affirm the high principles of international law, which recognise the most important rights of the international order – such as the right to be free from aggression, genocide, torture and slavery and the right to self-determination; while, on the other hand, they give legal form to the most fundamental policies or goals of the international community – the prohibitions on aggression, genocide, torture and slavery and the advancement of self-determination. This explains why they enjoy a hierarchical superiority to other norms in the international legal order. The fact that norms of *ius cogens* advance both principle and policy means that they must inevitably play a dominant role in the process of judicial choice”.<sup>99</sup>

The concept of ‘*ius cogens*’ as defined in Article 53 of the Vienna Convention has two major components: first, that it is a superior norm in terms of hierarchy to all other norms of international law that are not of the same stature; and, secondly, in order to produce such an effect it has to be recognised as such by the international community of states as a whole. Decisions of international tribunals give some clues as to the first consequences, although the use varies from tribunal to tribunal.

The ICJ for instance has tried to settle the issues brought before it without the help of *ius cogens*. In the *Nicaragua Case*, the Court pronounced the prohibition of aggression as a *ius cogens* norm only as an extra argument in its decision of why to continue with the case, despite the stark objections raised by the United States. It did not elaborate any further on what the consequences of *ius cogens* norms are or how one can identify them. In another decision on *Armed Activities on the Territory of the Congo*, the ICJ went into more detail on their consequences. The Court remained very cautious of using *ius cogens* norms to trump other norms of international law. In the *Armed Activities on the Territory of the Congo Case*, the ICJ, although finding that the crime of genocide set out in the Genocide Convention is of a peremptory character, decided that its *ius cogens* nature is only with regard to the substantive provisions of the Genocide Convention and it does not apply to the provisions on jurisdictional issues. Thus, it could be said that it is similar to the notion that reservations are allowed for provisions of a treaty that are not against its object and purpose and the jurisdictional clauses are not the object or

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<sup>98</sup> I.C.J., *Armed Activities on the Territory of the Congo [DRC v. Rwanda]*, 3 Feb. 2006, § 64.

<sup>99</sup> *Ibid.*, DUGARD, Separate Opinion, § 10.

the purpose of the Convention. Thus, the reservation that Rwanda made when it acceded to the Genocide Convention with regard to the compulsory jurisdiction of the ICJ in disputes arising out of the Genocide Convention cannot be overridden by the *ius cogens* nature of the crime of genocide.<sup>100</sup>

The Court seems to leave some room for manoeuvre by saying that a peremptory rules of international law do not exist in terms of the provisions of Article 9,<sup>101</sup> which deals with the jurisdiction of the ICJ in relation to disputes arising from the Genocide Convention. Therefore, reservations to Article 9 do not go against the *ius cogens* nature of the norms in the Genocide Convention.<sup>102</sup> Future developments seem to depend on how narrow the Court or other bodies interpret the case law of the ICJ. Hopefully, the ICJ or other courts in their future judgments will interpret the decision in the case so as to mean that it is only related to the rules that govern the jurisdiction of the ICJ as just another forum for settling disputes between states. This is the first majority opinion in which the Court specifically enters into a discussion on the issue of peremptory norms and hopefully the Court will have more courage in its next decisions when expanding on this concept. However, for the moment, the conclusion stands that the ICJ seems reluctant to use the concept of peremptory norms to trump over clearly established concepts like, the consensual character of the jurisdiction of the ICJ.<sup>103</sup>

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<sup>100</sup> I.C.J., *Armed Activities on the Territory of the Congo [DRC v. Rwanda]*, 3 Feb. 2006, § 67; which states that “Rwanda’s reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention; in the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention”.

<sup>101</sup> Article 9 of the Genocide Convention confers jurisdiction to the ICJ on any disputes including responsibility for genocide by any state. Disputes between the contracting parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

<sup>102</sup> *Ibid.*, § 69; which states that “in so far as the DRC contended further that Rwanda’s reservation is in conflict with a peremptory norm of general international law, it suffices for the Court to note that no such norm presently exists requiring a state to consent to the jurisdiction of the Court in order to settle a dispute relating to the Genocide Convention; Rwanda’s reservation cannot therefore, on such grounds, be regarded as lacking legal effect”.

<sup>103</sup> *Ibid.*, DUGARD, Separate Opinion, §§ 13-14; who states that “in the present case, the Court is confronted with a very different situation; the Court is not asked, in the

Other international tribunals have also very rarely used the concept of '*ius cogens*'. Tribunals that are likely to come across the concept are tribunals that deal with human rights issues like, the European Court of Human Rights (ECHR), the European Court of Justice (ECJ), the Inter-American Court of Human Rights (ACHR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY). These tribunals have made decisions concerning *ius cogens* in different issues. For example, the ECHR, in the case of *Al-Adsani v. UK*,<sup>104</sup> did not use the *ius cogens* character of the prohibition of torture to override the issue of state immunity in civil matters. The Court did not find a violation of Article 6 -i.e., access to courts-, when the UK denied standing to Al-Adsani to sue Kuwait for damages arising out of torture. For the Court, even though the prohibition against torture has risen to the status of peremptory norm, it still does not trump over immunities *ratione personae* of states in civil matters, while at the same time not awarding the same status of *ius cogens* to these immunities.<sup>105</sup> This case was decided by a very narrow majority, nine votes to eight, and the dissenters had their say in the matter. They clearly recognised the full effect of the concept of *ius cogens* and its overriding consequence to norms that are not of the same stature. More importantly, in my view, the dissenters put the source and the purpose of *ius cogens* in "*ordre public*; that is, the basic values of the international community, [which] cannot be subject to unilateral or contractual forms of derogation from their imperative contents".<sup>106</sup> In the words of the dissenting members:

"Due to the interplay of the *ius cogens* rule on prohibition of torture and the rules on state immunity, the procedural bar of state

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exercise of its legitimate judicial function, to exercise its choice between competing sources in a manner which gives effect to a norm of *ius cogens*; on the contrary, it is asked to overthrow an established principle -that the basis of the Court's jurisdiction is consent- which is founded in its Statute (Article 36), endorsed by unqualified state practice and backed by *opinio juris*; it is, in effect, asked to invoke a peremptory norm to trump a norm of general international law accepted and recognised by the international community of states as a whole, and which has guided the Court for over 80 years; this is a bridge too far [...]; for this reason the Court, in the present instance, has rightly held that although norms of *ius cogens* are to be recognised by the Court, and presumably to be invoked by the Court in future in the exercise of its judicial function, there are limits to be placed on the role of *ius cogens*; the request to overthrow the principle of consent as the basis for its jurisdiction goes beyond these limits; this, in effect, is what the Court has held".

<sup>104</sup> E.C.H.R., *Al-Adsani v. UK*, 21 Nov. 2001, *Reports*, 2001, XI, § 55.

<sup>105</sup> *Ibid.*, §§ 62-66.

<sup>106</sup> *Ibid.*, ROZAKIS, CAFLISCH, WILDHABER, COSTA, CABRAL BARRETO and VAJIC, Joint Dissenting Opinion, § 2.

immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on state immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *ius cogens*".<sup>107</sup>

Other courts have used *ius cogens* in other ways. For instance, it can be said that the ICTY, in the *Furundzija Case*,<sup>108</sup> made an intellectual exercise when it went on to find that the prohibition of torture is a peremptory norm of international law, since its findings did not have any effect on the case at hand. The pronouncement that the prohibition of torture is a *ius cogens* norm would not make the guilt of Anto Furundzija any greater under the ICTY Statute. Nor would it help in putting aside the fair trial provisions for a more certain and a speedier conviction. Nevertheless, the Tribunal continued discussing at length the practical implications of *ius cogens* norms on international and domestic norms and, when it comes to the issue of universal jurisdiction, it had to say that:

"Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *ius cogens* character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign states, and on the other hand bar states from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for states' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime".<sup>109</sup>

The ECJ, on the other hand, has used *ius cogens* in order to strengthen its somewhat controversial -and, in some circles, unpopular- judgments. In the case of *Kadi v. Council*,<sup>110</sup> the ECJ used the concept of *ius cogens* to imply that it can review the legality of a Security Council resolution regarding the seizure of funds of suspected supporters of terrorists, because it may conflict with the fundamental rights of the human person, which have

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<sup>107</sup> *Ibid.*, § 3.

<sup>108</sup> I.C.T.Y., *Furundzija Case (Lasva Valley)*, IT-95-17/1-T, *Judgement*, 10 Dec. 1998.

<sup>109</sup> *Ibid.*, § 156.

<sup>110</sup> E.C.J., T-253/02, *Kadi v. Council*, 2006/C 224/73.

attained peremptory status. It said that “the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *ius cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible”.<sup>111</sup>

Similarly, the Inter-American Court of Human Rights has used the concept of *ius cogens* to strengthen its somewhat controversial advisory opinion on the rights of undocumented migrants.<sup>112</sup> In this case, the Court noted that non-discrimination has attained the status of a peremptory norm and that it produced certain effects, and that:

“In its development and by its definition, *ius cogens* is not limited to treaty law. The sphere of *ius cogens* has expanded to encompass general international law, including all legal acts. *Ius cogens* has also emerged in the law of the international responsibility of states and, finally, has had an influence on the basic principles of the international legal order”.<sup>113</sup>

The brief case reference in this part of the paper suggests that courts rarely use the concept of *ius cogens* and that they all recognise that in theory they trump other norms of international law that are not of the same stature. But as we have seen in the cases of the ICJ and the ECHR, these courts are not willing to use *ius cogens* to override fairly established rules of international law, like the consensual nature of the jurisdiction of the ICJ and state immunity in civil matters. On the other hand, the ECJ and the ACHR used *ius cogens* as an extra argument in their reasoning for their somewhat controversial decisions. But, one notion for our paper is very important, and that is the fact that the concept of *ius cogens* norms has, in the words of the ACHR, permeated in other regimes of international law beyond the realm of the laws of treaties and can be now used as a yardstick for other concepts and all acts of states.<sup>114</sup>

The second implication given by the definition of *ius cogens* in the Vienna Convention is the questions of how we can recognise a norm of *ius cogens*, what are the criteria for it achieving such a status? A small help is given in the words “recognised by the international community of states as a

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<sup>111</sup> *Ibid.*, § 226.

<sup>112</sup> A.C.H.R., *Legal Status and Rights of Undocumented Migrants*, Adv. Op. OC-18/03, 17 Sept. 2003, *Series A*, Vol. 18.

<sup>113</sup> *Ibid.*, § 99.

<sup>114</sup> *Ibid.*

whole”, but that does not give many tantalising clues as to what constitutes the ‘international community of states as a whole’ and where one can find that recognition.

The ILC, in its commentaries to the Draft on the Law of Treaties, that later became the Vienna Convention, when elaborating on the concept of *ius cogens*, said that:

“There is no simple criterion by which to identify a general rule of international law as having the character of *ius cogens*. Moreover, the majority of the general rules of international law do not have that character, and states may contract out of them by treaty. It would therefore be going much too far to state that a treaty is void if its provisions conflict with a rule of general international law. Nor would it be correct to say that a provision in a treaty possesses the character of *ius cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void”.<sup>115</sup>

*Ius cogens* norms can arise from all sources of international law, custom, convention or general principle, and it is worth noting that “it is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may [...] give it the character of *ius cogens*”.<sup>116</sup> But the criterion which is set out in Article 53 cannot be easily set aside. The requirement is that the norm is recognised as such by the international community of states as a whole. The question arises that if recognition of the entire community of states is needed, then does that mean that any member of that community has a right to veto the emergence of a *ius cogens* norm? One consequence of that sentence is that it is only states that can give rise to peremptory norms. Opinions and practices of international organisations do not count. This is inherent in the term ‘community of states’. Statements made at the Vienna conference on the Law of Treaties by state representatives give clues to the answer to this question. Every member of the international community does not have a veto power; rather a peremptory norm can come into existence if the essential members of the international community of states recognise it as such.<sup>117</sup>

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<sup>115</sup> International Law Commission, *Commentaries to the Draft Proposal on the Law of Treaties* [reproduced in *Yearbook of the International Law Commission*, 1966, Vol. II, § 2.

<sup>116</sup> *Ibid.*

<sup>117</sup> See D. SHELTON, “Normative Hierarchy in International Law”, *supra* note 94; E.M. KORNIKKER UHLMANN, “State Community Interests, *Ius Cogens* and

A *third* common characteristic of these crimes is that their *ius cogens* character under international law cloaks them with obligations that are of an *erga omnes* nature. What that means is that the obligations in question are owed to every member of the international community as a whole and not just towards specifically determined or affected states. Every state has a legal interest in securing the performance of these obligations. A more detailed discussion on the consequences of *erga omnes* obligations is presented in the previous Part of this paper. The problem with *erga omnes* obligations is the fact that they have limited use. This has been revealed in the *East Timor Case*, where the ICJ said that the *erga omnes* character of a norm and the consent to jurisdiction of the ICJ are two separate issues and that because a norm is of an *erga omnes* character it does not mean that the ICJ can rule on the lawfulness of a conduct of a state -in this case, Indonesia- that is not a party to the case.<sup>118</sup>

#### IV. OVERLAP OF THESE CONCEPTS AND ITS CONSEQUENCES

Traditionally, international law has been seen as an aggregate of norms that governs international relations. As an aggregate of norms it prescribes what states must not do, or prohibitive norms; what states must do, or prescriptive norms; and what they may do, or permissive norms.<sup>119</sup> The system in which this aggregate of norms exists is a system of juxtapositioned states, which at times organise part of their endeavours in specific fields of interest through international organisations. The PCIJ summarised it best when it said that:

“The rules of law binding upon states [...] emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims”.<sup>120</sup>

A consequence of a system of the sovereign and equal states is a decentralised lawmaking process where there is no ultimate lawmaker who can decide what rule is a legal norm and what is a moral rule. A further consequence is that we cannot *per se* organise the system of norms in a specific hierarchy. If there is a hierarchy of norms then that hierarchy has

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Protection of the Global Environment”, *supra* note 95, pp. 112-113; P. WEIL, “Towards Relative Normativity in International Law”, *supra* note 96, pp. 419-423.

<sup>118</sup> I.C.J., *East Timor*, 30 June 1995, § 29.

<sup>119</sup> P. WEIL, “Towards Relative Normativity in International Law”, *supra* note 96, p. 413.

<sup>120</sup> P.C.I.J., S.S. ‘*Lotus*’, 7 Sept. 1927, p. 18.



to be consented to by all states. Even for a norm to be a norm of general international law, it has to be consented to by all states. Doing anything less would “blur the normative threshold”<sup>121</sup> and would create confusion as to what constitutes law, what is a binding legal obligation and what is a moral one. At least, that was the traditional positivist view of international law.

Today, the system of equal states is by and large still in existence, but with numerous distortions in its midst. We have regimes with supranational features that are flourishing, that are quite successful and are multiplying.<sup>122</sup> We are no longer talking about international relations but of trans-national relations,<sup>123</sup> where the interactions that cross the borders of nations are no longer dominated by interactions between states or states and private persons, but overwhelmingly, by private parties. Even the interactions between states on an official level is no longer exclusively done by their ministries of foreign affairs and today we have professional civil servants from different governmental departments, independent agencies, police departments, prosecutorial services and courts interacting with each other.

The sense of an international community is more present than ever before. These three concepts -that is, *ius cogens*, invocation of the responsibility of states by other than the injured state(s) and universal jurisdiction- are at the forefront of it and it is no surprise that they are very much intertwined. The concept of ‘obligations *erga omnes*’ was recognised because of a sense that certain obligations, even though not specifically agreed upon, are common and shared by all states and that every state has an interest in their performance. These obligations are closely linked to core values of the international society -i.e., the peaceful coexistence of nations, the respect for human dignity and the human person-, core values that are of such importance that are elevated to norms of a higher and imperative level. If these norms are violated, then international law creates not only the responsibility of states, but of individuals as well, by creating international crimes and conferring individual criminal responsibility. One segment of enforcement of international crimes is universal jurisdiction, which again is a concept for the protection of communitarian interests.

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<sup>121</sup> See P. WEIL, “Towards Relative Normativity in International Law”, *supra* note 96.

<sup>122</sup> See, for more details, L.R. HELFER and A.-M. SLAUGHTER, “Toward a Theory of Effective Supranational Adjudication”, *supra* note 45; H.H. KOH, “Why do Nations Obey International Law”, *supra* note 65.

<sup>123</sup> H.H. KOH, “Trans-national Legal Process”, *Nebraska Law Review*, 1996, pp. 181-207.

International crimes, at least those discussed in the Princeton Principles, are of a *ius cogens* nature. The *ius cogens* status of these crimes means that they trump over other norms of international law that are not of the same rank, like state immunity. Even the ECHR, in the *Al-Adsani v. UK Case*, confirmed that there is no state immunity in criminal matters, although they have confirmed it in civil matters *ratione personae*.<sup>124</sup> Their execution is a serious breach of an obligation arising under a peremptory norm, which under Article 41 requires a communal response by all states -even those who are not directly affected by the breach- in order to bring an end to the breach and to counter its effects.<sup>125</sup> States can take several steps on how to bring an end to a breach, but since we are talking here about international criminal law norms, one step would be to create an international tribunal like in the case of the ICTY, ICTR or the International Criminal Court. But states do not always respond adequately as a community and they often fail to respond at all because of political considerations. In such cases, can an individual state hoist up the banner of protecting the communal interests? I submit that the Draft Articles not only codify the obligation to cooperate, but also the obligation to take steps to stop the breach and to counter its effects. It seems logical that the obligation to cooperate would be useless if there was no prior obligation -or, at least, the possibility- of taking the measures to counter the effects of the breach individually. One can not be required to take measures collectively which one would not be required to take individually.

Furthermore, the Draft Articles specifically authorise states to call to responsibility the responsible state even though they are not the injured state. And again, if we develop the concept and transplant it to the realm of individual criminal responsibility, then we can say that any state, although not directly affected by the breach, has an interest in preserving the performance of the obligation. Consequently, it can call on the perpetrator, be it a state -as *per* Article 48 of the Draft Articles- or an individual, to responsibility. As a consequence to the individual perpetrator, this would mean launching a criminal process against her.

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<sup>124</sup> E.C.H.R., *Al-Adsani v. UK*, 21 Nov. 2001, § 65; which states that “the international prohibition against official torture had the character of *ius cogens* or a peremptory norm and that no immunity was enjoyed by a torturer from one Torture Convention state from the criminal jurisdiction of another; but, as the working group of the ILC itself acknowledged, that case concerned the immunity *ratione materiae* from criminal jurisdiction of a former head of state, who was at the material time physically within the United Kingdom; as the judgments in the case made clear, the conclusion of the House of Lords did not in any way affect the immunity *ratione personae* of foreign sovereign states from the civil jurisdiction in respect of such acts”.

<sup>125</sup> International Law Commission, *Commentaries to the Draft Articles*, *supra* note 14, Article 41, § 3.

Calling on the responsibility of an individual is a far smaller intrusion into the sovereignty of states than calling on its state responsibility. If the greater intrusion is authorised, then it is logical to conclude that the smaller one is as well.

We now have to consider the objection that the ILC was silent on the issue of calling for the responsibility of individuals for international crimes. True the ILC did not consider the possibility of a state calling for the individual criminal responsibility for violations of international crimes, although they fall under the concept of '*ius cogens*' as codified in the Draft Articles. The answer to this objection would be that it was not in the mandate of the ILC to consider this issue, because its mandate was limited to state responsibility and did not include individual criminal responsibility. But creating the obligation to respond to a serious breach of a peremptory norm is not limited to responding only to state actions causing the breach. There are no reasons why the observance of the mandate of the ILC by not discussing issues that were not on its agenda would prejudice this interpretation of the duty to respond and cooperate. We are well aware that today a great number of the breaches of *ius cogens* norms specifically protected by international criminal law are carried out by non-state actors. It would be silly to think that, because there is no direct state involvement than states that are not directly affected by the breach cannot act to put a stop to the breach and counter its effects.

Furthermore, the Draft Articles themselves do not preclude countermeasures of general interests or the taking of any lawful measures that are not mentioned in its Commentaries. Universal jurisdiction is a lawful measure that can be taken by a state in line with the *Lotus* standard; *i.e.*, so long as it is not enforced on the territory of another state without that state's consent. The lawful mechanism in question is the request for help in judicial matters, which is another example of cooperation in order to bring an end to the breach and to counter its effects. And let us remember that states are obliged to cooperate to that effect, which transplanted to individual responsibility would mean that states are obliged to give any assistance available to the prosecuting state. As we know, cooperation in judicial matters is normally carried out through bilateral treaties; extradition being the prime example. What I argue is that even in absence of bilateral treaty commitments of cooperation in judicial matters, the duty to cooperate would extend to all states and that they would be obligated to respond favourably to any request for assistance by the prosecuting state.

The *ius cogens* nature of these crimes, furthermore, would give them the possibility to trump over other norms of international law and even

domestic law. One such norm that was specifically recognised to be overridden by another *ius cogens* norm was the immunity *ratione materiae* of heads of states in the *Pinochet Case*,<sup>126</sup> later confirmed in the ECHR's *Al-Adsani v. UK* judgment.<sup>127</sup> Although the ICJ did not want to use *ius cogens* to trump fairly established rules of international law, like the consensual character of its jurisdiction, it nevertheless narrowed its decision. It went on to say that the reasons for not using the overriding characteristic of peremptory norms is because the *ius cogens* provisions of the Genocide Convention are only related to the substantive part of the crime and not to the dispute resolution mechanisms in the Convention, like Article 9.<sup>128</sup>

In order to better explain the concept, I will present a hypothetical case scenario. Let us imagine that in state A there is a civil conflict based on ethnic hatred. A rebel group created on an ethnic basis has seized territory where the majority of that ethnic group resides. It launches attacks from that territory on the civilian population not of its ethnic group in the rest of state A. The attacks can be qualified as crimes against humanity. The government of state A is trying to fight off the attacks, but it is not able to control its entire territory. State A is not a party to the Rome Statute and the backing of one of the permanent members of the UNSC is halting any reference by the Council to the ICC or any other collective action through the UN mechanisms.

In situations like these, although there has been a breach of a *ius cogens* norm, that breach cannot be attributed to state A and, consequently, other states cannot call for its international responsibility.<sup>129</sup> Nevertheless, the breach itself triggers the duty of states other than state A -since, in this case, it is the one that is directly affected by the breach- to cooperate in order to bring an end to the breach and to counter its effects.<sup>130</sup> In this scenario, the cooperative endeavour is not feasible because of the insurgent group's support by a permanent member of the UNSC with veto powers. However, this does not mitigate the duty of other states to try to bring an end to the breach or counter its effects.

Let us now say that state B is shocked by the atrocities committed during the conflict. It has the financial and other resources to prosecute the

<sup>126</sup> House of Lords, *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte*, 1 AC 61; 1 AC 147; 2 All ER 97; 2 WLR 827.

<sup>127</sup> E.C.H.R., *Al-Adsani v. UK*, 21 Nov. 2001, §§ 60-62.

<sup>128</sup> See discussion *supra* note 100.

<sup>129</sup> See International Law Commission, 2001 *Draft Articles*, *supra* note 21, Article 10 § 2.

<sup>130</sup> International Law Commission, 2001 *Draft Articles*, *supra* note 21, Article 41 § 1; *Commentaries to the Draft Articles*, *supra* note 14, §§ 2-3.

individuals it deems responsible and its law on criminal procedure has proscribed universal jurisdiction for crimes against humanity. As we by now know, the *Lotus* standard allows state B to prescribe such jurisdiction, so long as it does not attempt to enforce it on the territory of another state without that state's permission. It is presumed that the judicial system in state B satisfies the standards of fair trial procedures enshrined in the International Covenant on Civil and Political Rights and the European Convention on Human Rights. And now let us also assume that one of the leaders of the insurgent group has fled state A and is seeking asylum in state C. State B feels that it has sufficient evidence to launch a case against the insurgent leader and files an extradition request with state C.

In this situation, state B has several arguments that it can use in order to persuade state C to cooperate and surrender the insurgent leader for trial. State B can argue that the positive obligations of Article 41 § 1 require state C to join in this prosecution. State B can argue that the prosecution has now become a cooperative effort in order to deter the further continuation of the breach and to counter its effects by restoring the balance of justice. It will say that the essence of the duty prescribed in Article 41 § 1 is focused on putting an end to the breach, not on calling other states to responsibility. It can further argue that the duty in Article 41 § 2 extends to not giving support or safe haven to non-state actors and individuals and not just states, because it would amount to: *first*, the recognition of the legality of his actions; and, *second*, rendering assistance in maintaining the situation caused by the breach. In the case that state C has statutory provisions stating that a person that has applied for asylum cannot be extradited to a third country, state B can argue that the *ius cogens* nature of crimes against humanity would trump not only other international norms, but domestic laws of non-extradition as well.

This situation is designed with the possibility of prosecuting non-state actors in mind, where their actions cannot be imputed to the state where the breach has occurred. But, there is no overwhelming reason why these obligations would not apply to other scenarios that would involve state actors. The obligations to take actions to put an end to a breach and to counter its effects have no limitations that they apply only when dealing with non-state actors. Quite to the contrary, they are designed to apply in terms of state responsibility, where state actors are, by definition, involved. Legally there are no compelling objections why this would not be so. The only objections are of a political or prudential nature<sup>131</sup> and, although valid, they are not part of the examination in this paper.

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<sup>131</sup> H.A. KISSINGER, "The Pitfalls of Universal Jurisdiction", *supra* note 3.

## V. CONCLUSION

As the *Advisory Opinion on Undocumented Migrants* suggests, the concept of '*ius cogens*' has extended beyond the realm of the laws of treaties where it was first codified and found its place in another codification of the ILC; namely, the Draft Articles on State Responsibility. Consequently, the obligations that are created by these norms go beyond the law of treaties and now not only treaties can be null and void -that is, can be found not to produce legal effects- but also Security Council Resolutions and all other acts. *Ius cogens* norms produce the effect that if the obligations arising from them are breached then states are obliged to try to put an end to it and to counter its effects by taking lawful measures. More specifically, states are authorised to act in the community's interest by calling on the international responsibility of the responsible state. The obligation to put an end and to counter the effects of a breach can also be said to transcend the barriers of state responsibility where it first found its place. One of the measures to put an end or to counter the breach which can be undertaken is universal jurisdiction. Universal jurisdiction gives states the ability to prosecute the individuals responsible for that breach and if certain conditions are in place -for instance, the availability of the suspect-, this possibility should be used. This does not mean that the states prescribing universal jurisdiction can enforce it on the territory of another state without that state's consent, because universal jurisdiction is not a substantive provision of these international crimes and has not risen to the status of *ius cogens*. Quite to the contrary, the sovereign equality of states is a *ius cogens* norm. But, because of the obligations of cooperation in the Draft Articles, other states would be obliged to give judicial assistance to the prosecuting state as a way of putting an end to the breach and countering its effects.